Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

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Covad Communications Company ("Covad") submits this reply to the numerous sets of comments filed in response to the Commission's Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) ("Notice") in the above-captioned proceedings.

I. INTRODUCTION AND SUMMARY

If the Commission did not already have serious second thoughts about its Notice, it should now. The Commission cannot blind itself to the panic and uncertainty that the nation's telecommunications sector is suffering. That uncertainty is a direct and predictable result of the simple fact that the FCC has, in recent months, thrown open the entirety of its pro-competitive, pro-consumer implementation of the 1996 Act. In the ironic name of "certainty," the Commission has provided the nation's telecommunications sector only the certainty that chaos will prevail for the foreseeable future while the Commission turns 30 years of open networks and pro-Internet

proceedings on their heads. This proceeding in particular, the launch of which appears to have been heavily influenced by the suggestions of at least one Bell company[1], can have no benefit for any entity other than the four Bell companies. Indeed, the only support for the Commission's action in this proceeding comes from those four companies and their apologists. The opposition, predictably, comes from the competitive carriers whose tens of billions of dollars in investments since the enactment of the 1996 Act have brought consumers and businesses the benefits of innovative, competitively priced services. Covad in particular, which has just announced the launch of the lowest nationwide DSL pricing regime in the broadband industry[2], is troubled by the Commission's wholesale revisiting of the very rules that have made such consumer offerings a reality.

But the opposition is much wider and deeper. Government agencies – the Department of Defense and the Department of Justice, for example – strongly oppose the Commission's efforts in this proceeding, because of the potential disruption for the nation's emergency communications infrastructure and interference with law enforcement capabilities.[3] Advocacy groups for the disabilities community oppose the Commission's proposals because it would reduce or eliminate access of disabled

[1] *See* Letter dated Jan. 9, 2002, from William Barr, General Counsel, Verizon, to Chairman Michael Powell, FCC, (applauding the Commission for undertaking the instant rulemaking over a month *before* the NPRM was released) (added to the public record on February 21, 2002, over a month *after* the letter was received, and over a week *after* the NPRM was adopted by the Commission).

[2] *See* http://www.covad.com/residentialservices/telesurferlink.shtml for complete service and pricing description of Covad's $21.95 broadband offering.

[3] *See, e.g.* Department of Defense Comments at 2-3 ("NS / EP [national security and emergency preparedness] communication functions will be best served if the provisioning of broadband Internet access over wireline facilities remains classified as a telecommunication service" that can be regulated by the Commission under Title II of the Act); Department of Justice/FBI comments at 11-12 (". For years, a telephone subscriber has been able to use a "dial-up" modem to reach the Internet over a "narrowband" telephone line provided by a telecommunications carrier. Under CALEA, such a carrier is clearly obligated to afford law enforcement with surveillance assistance with regard to the wire or electronic communications transmitted by such a subscriber. It is untenable to suggest that the same carrier would be exempt from CALEA merely because it offered access to the Internet via a broadband facility/line, such as digital subscriber lines, instead of the dial-up connections.").

individuals to broadband services.[4] Consumer advocates oppose the Commission's proposal because adoption of the ILEC wish list will foreclose competition in the ISP and related Internet sectors, denying consumers choice, innovation, and price reductions that have been the direct result of competition.[5]

Four companies, and four companies alone, warmly embrace the Commission's action in this docket. True to form, the incumbent local exchange carriers[6] have seized upon the Notice – purportedly intended upon lessening the *retail* regulation of ILEC DSL service -- as a means to avoid entirely the procompetitive *wholesale* unbundling requirements of the 1996 Act as they apply to carriers seeking to provide advanced services such as xDSL. This is not surprising, as these are the very requirements that Covad and other companies have relied upon to attempt to break the incumbent LECs' monopoly grip over the local telecommunications markets. It is therefore very much in the incumbent LECs interest – but not the public's -- to see them done away with. Most basically, the incumbents (save Qwest)[7] argue that the tentative conclusions in the Notice should lead this Commission to eliminate their present unbundling obligations to carriers seeking to provide advanced services.

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[4] *See, e.g.*, Comments of Telecommunications for the Deaf, Inc., at 2 ("TDI asserts that if the Commission were to follow through on this proposal, telephone companies would certainly be granted additional freedoms, notably the freedom to discriminate against individuals with disabilities. The Commission must not undermine the intent of the Telecommunications Act by taking such a radical step.").

[5] *See, e.g.,* Consumer Federation of America Press Release, July 1, 2002, available at www.consumerfed.org ("the FCC's broadband proposals threaten to wipe out independent ISPs and destroy the dynamic environment for innovation the Internet has provided.").

[6] "Incumbent LECs" or "incumbents" including Bell South Corporation ("Bell South"), SBC Communications Inc. ("SBC"), Qwest Communications International, Inc. ("Qwest"), and the Verizon telephone companies ("Verizon").

[7] Unlike the other incumbent LECs, Qwest points out that the Notice cannot affect a CLEC's right to purchase UNEs to provide DSL-related facilities to offer telecommunications services directly to end-users or independent ISPs. *See* Qwest Comments, at 8-12. Nevertheless, Qwest does join its brethren in arguing that the Notice would foreclose the availability of UNEs to carriers that self-supply DSL-transport with their own Internet access via an integrated and/or affiliated ISP.

These arguments uncover the danger of the Notice and the slippery slope it would engender. The incumbent LECs are ready to direct their litigation armies to turn any conclusion(s) resulting from the Notice into a legal case to eliminate broadband competition over the telephone network. Not only should the Commission reject these ILEC arguments, but the Commission should further reject the tentative conclusions in the Notice which foster them. The telecommunications industry has been long too distracted by the ILEC *litigate first/compete last* approach to the 1996 Act.

And if the incumbents are successful – and the Notice, if adopted, would certainly give them hope – the Commission would have assured that the broadband market is dominated by two sets of monopolies with bottleneck control over customer access. That result would be harrowing for entrepreneurs like Covad, which designed a business plan and network based upon this Commission's current precedent and the 1996 Act. This binding law makes unbundled elements available to carriers for the provision of DSL-related service and makes clear that DSL-based transport is a "telecommunications service." Indeed, Covad has used (and is using) this legal precedent to bring innovative broadband technologies such as DSL to consumers (while the Bell monopolies sat on that technology for a decade). If the result of the Notice is to squash such intramodel broadband competition in its infancy, it cannot be said to meet the 1996 Act's primary statutory mandate to "promote competition in the telecommunications market."[8]

However, if the Commission's intent by the Notice is to somehow lessen the *retail* regulations, such as the tariffing requirements, surrounding the incumbent's

[8] *See* 47 U.S.C. § 157 nt. *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order ¶¶ 1, 3, 6, 21-22. (rel. August 8, 1996) ("*Local Competition Order*"). Importantly, Congress enacted the 1996 Act with full

offering of retail DSL services, it could do so in a much less problematic manner. For example, the Commission could address these issues in it current review of the regulatory treatment of incumbent LEC's provision of DSL services.[9] What the Commission should not – and legally cannot – do is accomplish that result in the manner proposed by the Notice, *i.e*., the reclassification of all broadband internet access as an information service not subject to Title II.

The 1996 Act and a long-standing litany of Commission precedent foreclose that ominous result. The Commission has a settled position that advanced services, including DSL-based services, are basic telecommunications services subject to Title II of the Act. Relying on that precedent, Covad built a business plan to bring DSL to the masses, thereby effectuating the Act's overarching goal of promoting telecommunications competition. Of course the RBOC monopolies sat on DSL technology until competitors like Covad forced them to deploy it themselves. The Commission should affirm this past precedent and CLEC rights to purchase UNEs for the offering of DSL services.

The incumbent LECs, like the Notice before it, act as if this precedent never occurred. They hardly even mention the unbundling requirements of the 1996 Act, except to say they should be done away with. Instead, singing from the same ILEC hymnal, they rely on a line of precedent in which the Commission has classified broadband internet access over cable lines as an information service. However, the cable modem regulatory classification is irrelevant to the ILEC statutory obligation to unbundle

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knowledge of the FCC precedent categorizing advanced services, such as DSL, as basic telecommunications services.

[9] *Review of Regulatory Treatment for incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 ("*ILEC Broadband Regulation Proceeding*"), Notice of Proposed Rulemaking, 16 FCCC Rcd. 22745 (rel. December 20, 2001).

their facilities. No matter how the incumbent LECs might want regulatory parity with cable modems, the fact remains that Congress, through the 1996 Act, required incumbent LECs to unbundle their networks and did not require the same for cable companies. As explained below, there are good historical and policy reasons for Congress to have done so. Those statutory requirements cannot be changed absent a change in the statute itself – something the FCC is powerless to do. Indeed, this Commission itself has made clear that its consideration of wireline broadband classifications is separate and distinct from its cable modem classification inquiry. And the Commission specifically did not bind itself to those cable decisions as applied to incumbent LECs.

The incumbent LECs, again like the Notice, argue that the proposed reclassification is necessary to address broadband deployment. However, the issues concerning broadband deployment are a Trojan horse, and not a particularly convincing one at that. As discussed at length in Covad's initial comments, and as the Commission itself has concluded, there is no "crisis" in broadband deployment.[10] That argument is a fiction of the incumbent's own creation. The real issue is the incumbent LECs' continued refusal to follow the very basic terms of the 1996 Act, as authoritatively interpreted by this Commission. In the 1996 Act, Congress mandated that the Commission promote telecommunications competition. And Congress only mandated a promotion of broadband deployment if there is a specific need.[11] As this Commission concluded just three months ago, no such need is present. Thus, the Commission should refocus its efforts where Congress intended it: on the promotion of competition.

[10] Report to Congress Pursuant to Section 706 of the Act, FCC 02-33, ¶ 28 (rel. Feb. 6, 2002); *see also Inquiry Concerning High-Speed Access to the Internet over cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, Declaratory Ruling and Notice of Proposed Rulemaking, at ¶ 9 (Mar. 15, 2002).

Beyond the competitive issues, the incumbent LEC comments have revealed a less talked about danger to the Notice: its effect on the federal Universal Service Fund. The incumbents are seizing upon the Notice as an opportunity to lessen their contribution to that fund. More specifically, the incumbent LECs point out, quite rightly, that the Notice's proposed reclassification would eliminate the requirement that DSL providers contribute to that fund.[12] That in itself should give the Commission great pause in adopting the conclusions of the Notice. But there is even more to worry about. The incumbent LECs go on to argue that, presumably in order to make up this revenue shortfall, ISPs and other content providers should contribute to the universal service fund based on the provision of interstate transport and/or broadband information access. Such a result – necessitated by the Notice's' proposed reclassification -- would have major policy implications, and is certainly at odds with this Commission's decade-long policy to keep the internet content providers deregulated, thereby lessening the cost of internet access to all Americans.

Finally, the Commission should also reject any finding that would lessen state's rights to promote broadband competition for DSL-based services. To be sure, the 1996 Act codifies those rights. The 1996 Act unambiguously gave states the ability to adopt regulations to fulfill its requirements, including the ability to impose "additional" requirements, beyond those adopted by the Commission, that are "necessary to further competition in the provision of telephone exchange service or exchange access," so long as those requirements are "not inconsistent" with the 1996 Act and the Commission's

[11] 47 U.S.C. § 157(b) nt.

regulations.[13] The Commission on numerous occasions has encouraged states to do so, viewing them as a partner in implementation of the 1996 Act. And states have, for the most part, accepted that responsibility by imposing such additional procompetitive requirements. As the telecommunications market and its underlying technology changes, it is absolutely essential for states to have the flexibility to react to these changes by imposing procompetitive regulations that assure that competition for broadband services is enhanced, just as the 1996 Act intended.

In sum, the Notice, if adopted, would only cause great uncertainty on many fronts, and would provide the incumbent LECs yet another excuse to send the telecommunications industry into protracted litigation. The time has come to send carriers out of the courtroom and into the market. The Commission should reject the tentative conclusions of the Notice that seek to exempt basic telecommunications service from Title II regulation and clarify, once again, that the requirements of the 1996 Act apply with full force to incumbent LECs providing advanced telecommunications services. Only with such action would the Commission be fulfilling its mandate to "promote competition in the telecommunications market." By its plain terms, competition – not false deregulation or any other contrived purpose -- is the central mandate of the 1996 Act.

II. THE ILEC ARGUMENTS UNCOVER THE HIDDEN DANGERS OF THE NOTICE

A. The Incumbent LECs Will Turn The Notice Into An Ominous Legal Case For Diminishing Their Unbundling Obligations

[12] The incumbent LECs cite to 47 U.S.C. § 254(d), which provides that "every telecommunications carrier that providers interstate *telecommunications services* shall contribute" to the federal universal service fund (emphases added).

[13] 47 U.S.C. § 261(b), (c).

The incumbent LECs argue that the Commission should adopt the tentative conclusion of the Notice that "the transmission component of retail broadband Internet access services provided over an entity's own facilities is 'telecommunications' and not a 'telecommunications service.'"[14] While the Notice, at least presumably, purports to do so in the name of deregulating the incumbent LECs' *retail* service offering, the incumbent LECs have a much more portentous result in mind. As Covad pointed out in its initial comments, the true intention and breath of the Notice is unclear on its face.[15]

The incumbents seek to exploit that ambiguity. They argue that such a reclassification would result in eliminating their present obligation to: (1) unbundle facilities used in providing broadband wireline services, and (2) sell UNEs to carriers like Covad seeking to provide a broadband information service, *e.g.,* DSL-based Internet access.[16] Put bluntly, the incumbent LECs believe the Notice gives them exactly what they have been clamoring for: absolute control over the DSL Internet access market.

These foreboding arguments should cause the Commission to reject the Notice, and its tentative conclusions, in their entirety. The ILEC arguments highlight the real threat posed by the Notice. As the Notice itself seems to acknowledge, its proposed reclassification could give the incumbent LECs just the legal argument they've been hoping for: a way to free themselves from any unbundling obligation under Section 251

[14] Notice ¶ 17.

[15] Indeed, in paragraph 61 of its Notice, the Commission appears to concede that there is at least ambiguity as to the potential impact on unbundling obligations of the Commission's tentative conclusions. Whether or not the Commission intended to impact unbundling – which it presumably did not – is unfortunately no comfort for those carriers who will face an onslaught of service denials, legal challenges to the Commission's unbundling rules, and further uncertainty beyond the untenable state of current affairs. The ILECs will seize on the Commission's tentative conclusions in this proceeding, if adopted, and utilize those conclusions to pursue a nationwide blitz of anti-competitive litigation.

[16] *See* Bell South Comments, at 17-18; SBC Comments, at 31-32; Qwest Comments, at 8-12; and Verizon Comments, at 30-31.

of the 1996 Act, at least as they apply to carriers seeking to provide advanced services. That result is contrary to every action this Commission has taken since the passage of the 1996 Act – and the 1996 Act itself -- and would end any hope of the broadband competition the Commission hoped to foster through those actions.

Such action would assure that the broadband market would be controlled by two monopoly carriers, each with bottleneck control over access to the end user. It is worth reminding the Commission that it is competitors, not monopolies, that brought DSL to the market. The incumbent LECs only offered DSL in response to such competition. It is competitors, not monopolies, that brought and continue to bring innovative services at lower prices to the market. It is competition and entrepreneurs, therefore, not monopolization and huge conglomerates, that the Commission should encourage. The 1996 Act demands just that. Any action taken by the Commission here, whether in the name of deregulation or otherwise, should not and cannot undermine the Commission's and the 1996 Act's adoption of intramodel competition for broadband services.

If it is the Commission's intent is to lessen the retail regulations concerning the ILEC offering of DSL services, the Notice is far too risky a manner in which to accomplish that result. It would create far less upheaval for the Commission to address these retail deregulation issues in the context of its review of the regulatory requirements of ILEC broadband "telecommunications services." [17] There, the Commission is reviewing the treatment of the ILEC DSL offerings in a manner consistent with its past treatment of those offerings: as basic telecommunications services. The Commission can

[17] *ILEC Broadband Regulation Proceeding.* It is worth noting that SBC, in initiating that proceeding, conceded that its DSL offerings are subject to Title II. Yet it now claims just weeks later here that these DSL offerings are not common carrier offerings after all.

do in that docket exactly what it proposes to do through the NPRM, but save the industry from the hazardous ramifications the ILECs will create from the Notice.

The incumbent LECs have a well-established track record of litigating each and every issue they possibly can. Thus, we need not guess their intentions here. No matter the result of the NPRM, the incumbent LECs will take that result as the starting block of a new round of litigation intended upon freeing themselves of their clear cut obligations under the 1996 Act.[18] The telecommunications industry has been mired in ILEC-initiated litigation since the 1996 Act's inception. That litigation brings uncertainty to a market that – six years later – should have evolved to something far more definite and mature. Litigation drains resources; and its correlated uncertainty further diminishes the ability of carriers to obtain capital. Indeed, just last month the D.C. Circuit ruled upon an ILEC-initiated appeal, remanding the Commission's *UNE Remand* and *Line Sharing orders*.[19] These are, of course, the two principle orders that carriers operating in the local exchange market are relying upon to execute their business plans, both for voice and DSL-related offerings. That decision has created new and unneeded uncertainty in the already depressed telecommunications market.

The telecommunications market needs certainty. The Notice has provided just the opposite. The Commission should provide such certainty by affirming its long-standing

[18] The fact Verizon sued the FCC in the wake of its cable modem declaratory ruling (Verizon is not a cable company) suggests the course of litigation that Verizon intends to pursue. By challenging the Commission's cable modem decision, Verizon intends to force the Commission to remove unbundling obligations from it and its BOC brethren, given the refusal of the Commission to impose such obligations on the cable companies. Despite the lack of relevance of the one proceeding to the other, the Commission should be wary of giving Verizon and the BOC cartel any further ammunition to pursue judicial and legislative overrides of the Commission's policy determinations.

[19] *USTA v. FCC*, __ F.3d. __, Case No. 1015 (D.C. Cir. May 24, 2005). Soon after that ruling was released, Chairman Powell issued a statement clarifying that all existing UNE obligations remain in full force.

treatment of DSL-based services and reaffirm the right of carriers to purchase UNEs to offer advanced services, including DSL.

B. The Incumbent LECs Will Use the Notice to Disturb the Federal Universal Service Fund

The ILEC comments bring to light another danger of the Notice: its affect on the federal Universal Service Fund ("USF"). Certain incumbent LECs point out, quite rightly, that Section 254(d) of the Act only requires that "telecommunications carriers" that provide "interstate telecommunications services shall contribute" to the federal USF.[20] Thus, the incumbent LECs tacitly acknowledge the fact that the Notice, by limiting the number of telecommunications services, would remove revenue from the USF.

This fact in itself should lead the Commission to reject the Notice. As this Commission is well aware, as interstate toll revenues have decreased over the last decade, so too have interexchange carrier contributions to the federal USF. It is important, therefore, that the Commission maintain USF revenue streams sufficient to support existing programs, without imposing new and untenable burdens. The Commission's consistent designation of DSL-based services as an interstate "telecommunications service" is important in many aspects, one of which is that it allows the Commission, pursuant to the plain terms of Section 254(d), to require DSL-based carriers to contribute to the federal USF. Notably, the Commission has found that carriers providing DSL transport service to non-affiliated ISPs are providing telecommunications services, and revenues from such services are therefore subject to the USF assessment. Unlike

[20] 47 U.S.C. § 254(d). *See* Bell South Comments, at 29-32; SBC Comments, at 41-44; Verizon Comments, at 42-43.

interstate toll revenues, DSL-based revenues are increasing, and therefore represent an important present and future contributor to the federal USF. By changing the designation of DSL services, the Commission would place these contributions at risk.

But the incumbent LECs give the Commission even more to worry about. The incumbents, never missing a trick, seize upon this problem as a means to even further lessen their contribution to the federal USF. They contend that ISPs, cable companies, and all content providers contribute to the USF, presumably to make up any revenue shortfall.[21]

Of course such a requirement would have major policy ramifications. Most importantly, it is contrary to this Commission's efforts over the last decade to keep ISPs and the Internet unfettered by government regulation or surcharges. Indeed, that goal is what drove the Commission to exempt ISPs from paying federal access charges to the incumbents, designating ISPs as an end-user for such purposes.[22] Making ISPs pay into the universal service fund would subject the Internet, for the first time, to government-imposed regulatory payments.

Because the Notice threatens the revenue stream of the USF, and otherwise puts at risk the Commission's policy to keep the Internet deregulated and free of government fees, it should reject the Notice in its entirety. The Commission should not put competition and universal service at risk for the purported need to deregulate the

[21] *See* Bell South Comments, at 29-32; SBC Comments, at 41-44; and Verizon Comments, at 42-43.

[22] The Commission has long recognized that ISPs do in fact contribute to the USF, but indirectly. ISPs purchase business lines from carriers, and thus are responsible for paying USF pass-throughs on those business lines. Thus, were the Commission to require ISPs to pay into the USF directly as well as indirectly, it would be requiring those ISPs to pay into the USF twice, while perversely exempting the carriers from paying in at all.

incumbent LECs' retail DSL services. That result can be accomplished in a far less detrimental manner.

C. The Notice Puts ISP Competition At Risk

If adopted *with the legal effect* advocated by the incumbents, the Notice would put an end to intramodel broadband competition over the telephone network. Instead, the Notice would assure the existence of two dominant players in the broadband market: the cable monopolies and the telephone monopolies. Each would control bottleneck access to the consumer; and each would have every incentive to foreclose access to that bottleneck broadband network to non-affiliated ISPs.

The incumbent LECs pay lip service to this problem, claiming that they do not need a regulatory incentive to strike deals with ISPs to provide access to their networks. A brief review of the last one hundred years of monopoly action makes this claim very hard to swallow. History tells us that monopolies will take any action possible to protect their revenue streams and control over their customers. While the cable companies have made a few deals to allow very large ISPs to access their network, such agreements are few and far between. And the incumbents here would have every incentive to deny access to nonaffiliated ISPs. Such anticompetitive action would only enhance the market share and revenue stream of the incumbents' affiliated ISPs, which are growing in strength. The incumbents' argument – that they do not need a regulatory incentive to open their networks to competing ISPs – rings hollow. Indeed, that claim is directly contradicted by the incumbent's actions, which demonstrate their true intentions. SBC,

for example, requires that customers purchasing its DSL services use one of SBC's affiliated ISPs.[23]

The incumbents are fighting on every front to deny ISPs and CLECs access to their networks. They have spent hundreds of millions of dollars attempting to pass legislation both in Congress and in the states to deny or limit access to DSL and voice competitors. They have continually argued, even here, that states should not have the ability to go beyond the FCC's unbundling requirements, and they have taken appeal of every FCC and state commission order that directed them to unbundle anything. Based on this history, it beyond credulity for the incumbents to now claim that they will open their networks without a regulatory edict to do so.

Absent regulatory obligations, there is no evidence that ISPs could possibly gain access to bottleneck broadband telephone network on favorable terms and conditions, especially smaller ISPs that lack any bargaining power. And as the incumbent LECs' affiliated ISPs gain market share -- not because of competition but because of monopoly leveraging – the ILEC interest in striking a deal with any unaffiliated ISP, no matter how large, becomes all the more unlikely. The monopoly broadband plan is simple: keep pushing your own ISP on customers by denying access to any non-affiliated ISP. The result of such monopoly leveraging is obvious: higher prices and less innovation for Internet access.

This is another reason why intramodel competition is so important. Unlike the incumbent LECs, DSL providers like Covad lack the size and market power to deny access to unaffiliated ISPs. In fact, it is very much in Covad's interest to strike deals with

[23] SWBT previously offered a stand-alone DSL offering that allowed customer to choose their own ISP, but it has since eliminated that offering because it would subject it to the resale requirements of

any and all ISPs, whether large or small, that are willing to purchase Covad-provided DSL on a wholesale basis. Covad, in fact, has a history of doing just that. Covad's success not only gives these ISPs a willing partner in the high-speed access market, but also puts market pressure on the Bells and cable companies to open their networks to unaffiliated ISPs. It is effective competition that motivates the monopoly best.

Indeed, Bell South itself concedes that the ISPs' right to access their network from CLECs is the driving force for continued ISP competition and/or the alleged incentive of incumbents to strike deals with unaffiliated ISPs. As Bell South so aptly put it:

> The 1996 Act establishes the framework and the opportunity for ISPs to select from an array of competing providers of local exchange services to obtain interconnection to, and other features from, the local exchange network. *Indeed, the benefits of this framework manifest themselves to ISPs in two ways. First the 1996 Act ensures that an ISP that desires to obtain certain unbundled features or services for its service offering, may seek them from a CLEC who has specific rights under Section 251. Second, because of the presence of CLECs, ILECs have the specific incentive to accommodate the ISP's need rather than risk losing that ISP to a comp*etitor.[24]

Bell South is dead on right. But what Bell South fails to acknowledge in its prose is that the Notice, as it is interpreted by Bell South itself,[25] would eliminate the ability of CLECs like Covad to purchase UNEs to provide DSL services to the ISP. That result would eliminate any incentive on the incumbent to "accommodate the ISP's needs." The incumbents are talking out of both sides of their monopoly mouths.

Section 251(c)(4).

[24] Bell South Comments, at 17 (emphasis added).

The Commission should reject the Notice and its tentative conclusion, all of which would give the incumbents just the arguments they need to deny access to their network to competing DSL carriers and non-affiliated ISPs.

III. THE ILECS, LIKE THE NOTICE, IGNORE ESTABLISHED LAW AND POLICY

A. The Commission May Not So Cavalierly Deviate From Past Precedent

There are reasons courts and regulatory bodies rely upon past precedent. In the legal arena, it brings predictability to the process. In the regulatory arena, past precedent serves a unique purpose. Regulatory bodies, like the FCC, are often directed by statute to define the rights and responsibilities among carriers in a given industry. These carriers then take their cue from the FCC, acquiring capital, investing in network assets, and constructing business plans consistent with the precedent set by the regulatory body.

In adopting rules implementing the terms of the 1996 Act, this Commission defined the rights and responsibilities of CLECs and incumbent LECs. In a long list of dockets starting with its *Local Competition Order*, the Commission carefully and deliberately combed through the varied comments of interested parties and defined the terms and conditions by which requesting carriers could purchase unbundled network elements from the incumbent LECs. Starting with the *Local Competition Order,* and through its *Advanced Services Order*[26]*, UNE Remand Order*[27]*,* and *Line Sharing Order*[28]*,*

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[25] In fact, in the very next paragraph of its comments, Bell South argues that if the Notice were adopted, CLECs seeking to provide broadband services "would be prohibited from obtaining such UNEs pursuant to statute." Bell South Comments at 17.

[26] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, And Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, (rel. Aug. 7, 1998) ("*Advanced Services Order*").

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order (rel. November 5, 1999) ("*UNE Remand Order*").

the two things the Commission has made perfectly clear is that: (1) DSL is an advanced telecommunications service, and (2) carriers can purchase network elements to provide DSL-based services. We know that DSL is an advanced "telecommunications service" because the Commission has told us so on numerous occasions. As the Commission has held, a carrier offering advanced services:

> 'is offering a telecommunications service.' An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such case, however, we treat the two services separately: the first is a telecommunications service (e.g., the xDSL transmission path), and the second is an information service, in this case Internet access.[29]

The uptake of this precedent, as this Commission has also ruled, is that it gives carriers, like Covad, the right to take advantage of the 1996 Act to order unbundled elements for the purpose of providing DSL-based advanced services. As the Commission held, Congress made clear that the 1996 Act is to be applied equally to voice and advanced services: "We first conclude that the procompetitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 is technologically neutral and is designed to ensure competition in all telecommunications markets. . . We also clarify that the facilities and equipment used by the incumbent LECs to provide advanced services are network elements and subject to the (unbundling) obligations in Section 251(c)(3)."[30] This conclusion has been

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[28] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98 ¶ 1 (1999) ("*Linesharing Order*").

[29] *Advanced Services Order* ¶ 36.

[30] *Advanced Services Order* ¶ 10.

affirmed twice by the D.C. Circuit.[31] For the sake of brevity, Covad will not repeat that vast precedent herein. Cited at length in Covad's initial comments are the wealth of Commission orders and rules explicitly holding or relying upon the principle that DSL-based services are telecommunications services and that carriers may purchase network elements to provide them.

To summarize this precedent, when a carrier providers DSL transport service to an ISP it is providing a regulated, basic telecommunications service. This is true whether or not the entity providing the service is an ILEC or CLEC, or even whether the ISP is an integrated, affiliated, or unaffiliated ISP. In this scenario, the ISP is a consumer of DSL service. That ISP then provides internet access over DSL to the end-user. The service provisioned to the end-user by the ISP is a non-regulated enhanced information service. [32]

Like the Notice before it, the incumbent LECs completely ignore the existence of this precedent. But this precedent cannot be ignored. The law requires that an agency may not change course (or rescind a rule) without first supplying a well-reasoned analysis explaining the change.[33]

There is good reason for the law to bind a regulatory body to its past precedent. A change in precedent by a regulatory body can have adverse affects on regulated carriers. This is especially true of the Notice. Covad has relied upon the Commission's past precedent to build a nationwide network capable of providing consumers DSL-based Internet access. As a result of section 251(c)(6) of the Act the Commission's collocation

[31] *See ASECENT v. FCC*, 235 F.3d 290 (D.C. Cir. 2001) (Court holds that FCC erred in allowing SBC/Ameritech to avoid Section 251(c) unbundling requirements by offering advanced services through an affiliate); *WorldCom, Inc. v. FCC,* 246 F.3d 690, 694 (D.C. Cir. 2001) (Upholding FCC's application of Section 251(c) duties upon incumbents that are providing advanced services).

[32] For a visual depiction of this example, see Exhibit A attached to Covad's initial comments.

orders, Covad has been able to build out collocation space in over 1800 incumbent central offices, resulting in the largest nationwide broadband network of any carrier. Since its founding in 1996, Covad has raised over $2 billion and built a nationwide facilities-based network, including packet switches, DSLAMs, and other broadband equipment and facilities. Covad is just the type of facilities-based carrier the 1996 Act envisioned. Also in reliance on FCC precedent, Covad has purchased unbundled and line shared loops from the incumbents to provide high-speed internet connections to approximately 370,000 customers nationwide. And now, Covad has taken the pro-consumer step of reducing broadband prices to the lowest level that consumers have been able to enjoy from any DSL provider. Covad's network architecture and business plan, and its pro-competitive consumer and small business offerings, rely upon the continued availability of unbundled loops for the provisioning of these advanced DSL services. Other carriers have similarly relied upon the Commission's rules and precedent.

Based on this industry-wide reliance on this important past precedent and policy, the Commission cannot cavalierly abandon it without an vitally important (and record-supported) reason to do so. Neither the Notice, nor the incumbents, provide any reasonable basis for the Commission to depart from its well-settled policies. The incumbents, like the Notice, do not account for the massive disruption the Notice would have on the already depressed telecommunications industry. The Notice should be rejected.

B. The ILECs Provide No Basis For the Commission to So Abruptly Deviate From Its Past Precedent

[33] *See* Covad Comments, at 53-58.

The incumbents first couch the Notice in terms of an attempt to reduce regulation of the incumbent retail DSL offerings. As noted above, the Notice could have much broader and serious implications, at least as the incumbents construe it. But such reduced regulation cannot justify a decision by the Commission to turn its back on regulation that it has adopted as a matter of strong, consistent, policy, and as required by the 1996 Act. This is especially true since most of the regulations the Commission seems intent upon loosening are retail regulations that can be eliminated absent the extreme change in direction proposed by the Notice.

The only precedent the ILECs cite in support of the sweeping changes they advocate is the Commission's ruling in the *Cable Broadband Declaratory Ruling.*[34] In that ruling, the Commission found that cable modem service is properly classified as an interstate information service and is not subject to common carrier regulation under Title II. In acknowledgment of the Ninth Circuit's ruling that cable modem service is a "telecommunications service," the Commission also forebeared from regulating cable modems under Title II.[35] The incumbents argue that this ruling should apply equally to their offering of DSL transport services.

Despite the ILECs' suggestions that the Commission's cable ruling promotes broad changes to the Commission's telecommunications regulation, the cable ruling is no departure from long-standing Commission precedent. The Commission's conclusion that Internet access services that incorporate cable modem services are "information services"

[34] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, CC Docket Nos. 00-185, 02-52, FCC 02-77 (rel. Mar. 15, 2002) ("*Cable Broadband Declaratory Ruling"). See* Bell South Comments, at 6-9, 11; SBC Comments, at 1-4, 8-11; Qwest Comments, at 5-8; Verizon Comments, at 23-30.

[35] *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), *reversing*, 43 F. Supp. 2d 1146 (D. Ore. 1999).

is fully consistent with the Commission's past precedent that ISPs that incorporate DSL transport provide an "information service" to end-users. That ruling does not and should not change the fact that the underlying DSL transport remains a basic telecommunications service.

Moreover, the Commission's decision to exclude cable companies from the scope of Title II is consistent with the historical treatment of cable companies. The cable industry has been regulated first pursuant to Title III and then pursuant to its own Title VI. This is in large part because the cable industry, unlike the phone industry, was never the subject of affirmative government grants of exclusive franchises or guaranteed profits.

The telephone companies, on the other hand, have always been regulated as common carriers subject to Title II. And Congress, in passing the 1996 Act, recognized the fact that their networks, and efficiencies of size and scope, were built on the backs of captive ratepayers. Thus, in hopes of spurring competition in the local exchange market, Congress passed the 1996 Act, which required the Bell Companies to lease piece parts of their network to competing carriers. Congress chose not to extend these same unbundling rules to cable companies. Thus, the cable modem regulatory classification is and always has been irrelevant to the ILEC statutory obligation to unbundle their facilities. Congress, through the 1996 Act, required incumbent LECs to unbundle their networks and did not require the same for cable companies. Those statutory requirements cannot be changed absent a change in the statute. Try as they might, the incumbents can never receive regulatory parity with the cable companies absent a change in the statute.

The parity that Congress *did* require is parity of access to network elements; the FCC has ruled unequivocally that an "unbundled network element provided by an incumbent LEC [to a requesting carrier] must be at least equal in quality to that which the incumbent LEC provides to itself."[36] Yet five years later, the incumbents are still trying to undo this bedrock principle by arguing that CLECs should not have access to network upgrades made on their networks.

It is important to remember that Congress passed the 1996 with full knowledge of the Commission's treatment of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced services" developed in the Commission's *Computer II* proceedings. As this Commission has itself held, this requires that the statute be interpreted consistently with these previous rulings.[37] Thus, the Commission may not here, consistent with governing law, abandon its prior regulation of advanced services.

Beyond their reliance on the cable modem classification, the incumbents rely upon the same overly semantic arguments contained in the Notice. Specifically, the incumbents agree with the Notice that self-supplied DSL-transport is not "offered" to ISPs but "used" to provide an information service. Thus, they argue that such a service does not fall under the statutory definition of a telecommunications service: "the offering of telecommunications for a fee directly to the public, or to a class of users as to be effectively available directly to the public, regardless of the facilities used."[38]

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[36] *Local Competition Order* ¶ 312.

[37] *Federal-State Board on Universal Service,* CC Docket 96-45, Report to Congress, 13 FCC Rcd. 11501 ("*Universal Service Report")* ¶ 21 (1998).

[38] 47 U.S.C. § 153(46).

Again, as noted in Covad's initial comments, this argument is contrary to past precedent, which recognizes that the ISP is considered the customer of the telecommunications service, *i.e.,* of the telecommunications component of the offering. This is entirely consistent with the Commission's finding in *Computer II.*[39] There, the Commission found that the provider of the enhanced or information service is a consumer (not a provider) of the underlying telecommunications service. The provider of the transport/telecommunications service is providing a Title II regulated telecommunications service.[40] In *Computer II*, the transport/telecommunications service is not being provided to a traditional end-user, but to a provider that turns and offers the bundled package as an enhanced (or now information service). This conclusion must be true whether or not the underlying telecommunications service is self-supplied. That fact has no bearing on the regulatory obligations that attach to the telecommunications service component.[41]

Taking off on this same theme, Qwest rightly points out that the Notice *could not* affect a CLEC's right to purchase UNEs to provide to offer telecommunications services

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[39] *Regulatory and Policy Problems Presented by the Interdependence of Computer & Communications Services and Facilities*, 28 FCC 2d 267 (1971), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, Final Decision, 77 FCC2d 384 (1980) ("*Computer II*"), *recon.*, 84 FCC2d 50 (1980), *further recon.*, 88 FCC2d 512 (1981), *aff'd sub nom., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982, *cert. denied*, 461 U.S. 938 (1983).

[40] *Computer II* ¶¶ 1147, 117.

[41] *See, e.g.*, *Bell Telephone Co. of Pa. v.* FCC, 503 F.2d 1250 (3rd Cir. 1974); *MCI Communications Corp. v. AT&T*, 369 F.Supp. 1004 (E.D. Pa. 1973), *vacated*, 496 F.2d 214 (3rd Cir. 1974); *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, Docket 19896; *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, Docket 19896, Decision ¶ 26 (rel. Apr. 23, 1974).; *Independent Data Communications Manufacturers Assn.'s Petition for a Declaratory Ruling That AT&T's Interspan Frame Relay Service is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (adopted October 16, 1995; rel. October 18, 1995) ("*Frame Relay Order*"). This line of cases is discussed at length on pages 65-72 of Covad's initial comments.

directly to end-users or independent ISPs.[42] We agree. But what Qwest further contends is that the Notice *would* negate a CLEC's present right to purchase UNEs and offer at retail a bundled internet access/DSL offering using its own integrated and/or affiliated ISP. (Qwest Comments at 8-12). Qwest's position relies upon the same faulty logic of the Notice. As noted above, the supplier of the information service makes no difference as to the classification of the underlying telecommunications service, or the regulatory obligations that attach to it. Moreover, Qwest's position, if adopted, would eliminate the ability of companies, like Covad, to purchase UNEs to offer end-users a complete package of DSL plus internet access. Of course, the incumbents, including Qwest, stand ready and prepared to offer their customers just that. Thus, the true intent of Qwest's argument is to save for itself a monopoly on such bundled packages.

The incumbents also argue that the Notice is necessary from a policy perspective because they are "not the dominant provider" in the broadband market. Thus, they argue at length that they deserve regulatory parity with the dominant provider, the cable companies.[43] But the point the incumbents ignore is that no matter their market position in a retail product market, the ILECs are bottleneck suppliers of facilities needed to provide broadband telecommunications services. Put another way, the incumbents control an essential input for carriers seeking to provide broadband. That fact is what led Congress to order the FCC to open ILEC networks to competitors; and that fact is what led the FCC to conclude that the Bell companies are obligated under the 1996 Act to unbundle the high frequency portion of the loop and sell loops to competitors seeking to

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[42] *See* Qwest Comments at 8-12.

[43] *See, e.g.,* Bell South Comments, at 13-19; SBC Comments, at 19-20; Verizon Comments, at 18-23.

provide advanced services, including DSL. Thus, even if the telephone companies did not offer DSL services, and thereby held a 0% market share in the Internet access market, they still would have the obligation to unbundle those bottleneck facilities. Their market share in the broadband market is irrelevant.

The incumbent LECs, again like the Notice before it, claim that the Notice is necessary to invigorate broadband investment. But even this Commission has concluded that there is no broadband deployment problem.[44] The 1996 Act only mandates the Commission to take action to "accelerate deployment" of advanced telecommunications capability if the Commission first determines that such capability is not being deployed in a reasonable and timely fashion.[45] The Commission has just concluded that advanced telecommunications are being deployed in a reasonable manner.

The so-called broadband deployment issue is one ginned up by the Bells in an attempt to blackmail policy makers around the country. Straight from Monopoly 101, the Bell argument goes like this: *unless you relieve me of my obligations to unbundle my network to carriers seeking to provide DSL services, I won't upgrade my network so that it can deploy more such services.* Put another way, the Bells either want competition their way, on their own terms, or they'll take their ball and go home.

What the Bells don't tell the Commission is that they are still upgrading their networks in order to accommodate more DSL services, by placing more fiber in the loop, despite the existence of state and federal requirement to unbundle those facilities for use by advanced services providers. Their vague claims of "rolling back" deployment are

[44] Report to Congress Pursuant to Section 706 of the Act, FCC 02-33, ¶ 28 (rel. Feb. 6, 2002); *see also Inquiry Concerning High-Speed Access to the Internet over cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, Declaratory Ruling and Notice of Proposed Rulemaking, at ¶ 9 (Mar. 15, 2002).

simply untrue and certainly unsupported on this record. What the Bells also don't tell the Commission, but what they do tell investors, is that the network upgrades associated with broadband expansion, such as SBC's vaunted Project Pronto, save the incumbents billions of dollars in maintenance savings each year, thereby paying for themselves absent any DSL services ridding over them.[46]

And while the Bells tell regulators that any delay in network upgrades is caused by regulation, they again tell investors quite the opposite. SBC, for one, has told Wall Street that it delayed deployment of Project Pronto not because of any regulatory reason, but because of Ameritech's outside plan and the related service quality problems.[47] Blaming this Commission's regulation for delay is disingenuous. Perhaps the true story was best told by SBC itself in its annual report dated February 9, 2001, which provided that "potential efficiency benefits likely outweigh resale and unbundling obligations that would apply to advanced services and we do not believe, at this time, that this issue will have a material effect on our results or operations or financial position."[48] Exactly. The incumbents' claims of a broadband deployment issue is a self-imposed fiction that is unsupported by any facts.[49]

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[45] 47 U.S.C. § 157(b).

[46] SBC's investor briefing states that "network efficiency improvements alone will pay for [the Project Pronto] initiative." October 18, 1999 SBC Investor Briefing, p. 2. SBC also states that it will attain "annual savings of $1.5 Billion by 2004" and that the "capital and expense savings pay for initiative on NPV basis." *Id.*

[47] SBC Communications Investor Briefing, December 19, 2000 (announcing a delay in Project Pronto deployment in order to undertake "service upgrades for customers in the Ameritech region").

[48] SBC 2000 Annual Report, dated February 9, 2001.

[49] Besides these cost savings, broadband expansion allows the incumbents to tap into a new and highly lucrative source of revenue.

Rounding out their usual arguments, the incumbent LECs claim that it costs too much and is technically difficult to unbundle this broadband architecture.[50] None of them quantify such costs or discuss specifically just what these technical difficulties are. These arguments bring to mind the immortal words of Yogi Berra: *It's like déjà vu all over again.* These are the same arguments the Bells have raised since the Commission began its effort to open the ILEC networks to competition. Any step this Commission took to promote DSL competition was met with a claim by the Bells that those steps would be too expensive and burdensome. They raised these arguments against unbundling in general, they raised these arguments against unbundling the HFPL, and they raised these arguments against line sharing. None of them have come to fruition. To the contrary, unbundling and especially line sharing have proven to be technically simple and economically superior to any alternatives.

Moreover, the incumbents' argument – that opening their networks is somehow costly and burdensome – is directly contradicted by their claims of a "natural incentive" to open their networks to unaffiliated ISPs. In making *that* argument Bell South notes that "economies of the network favor recovering the cost of the network over as many customers as possible."[51] Verizion similarly points out that "[t]he more traffic on the network, the easier it is to recover [investment] costs."[52] Based on this "need to fill up" their networks, the incumbents argue that they have a natural incentive to open their network to unaffiliated ISPs. This argument begs the question: If the incumbents have an

[50] The incumbents also attack the TELRIC pricing methodology, arguing that DSL carriers are getting a "free ride" on their network. The Supreme Court's recent affirmation of TELRIC in *Verizon v. FCC* put those arguments to bed for good.

[51] Bell South Comments, at 22.

[52] Verizon Comments, at 31.

incentive to open their networks to fill capacity, why have they fought so hard to deny CLECs the right to access that network? The reality is the incumbents *would* have an incentive to fill their networks *if and only if* they did not have bottleneck control over access to the end-user. Preservation of that position trumps any need of the incumbent to utilize their networks efficiently.

The cost of unbundling is simply not the issue. In Illinois, SBC's Chief Technology Officer admitted that SBC would have suspended its broadband deployment in Illinois even if the cost to comply with the Illinois commission's unbundling order was zero.[53] The incumbent LECs are not concerned about the cost; they want to control the DSL market segment. They do not want to share their bottleneck. They already control 95% of the local exchange lines in their respective regions and they want to leverage that control of their bottleneck assets to other telecommunications services, such as DSL.

Indeed, even with the regulatory unbundling requirements, the incumbents have been quite successful in keep the DSL market to themselves. Tellingly, the Commission's recent Report to Congress finds (based on carriers' own data) that the incumbent phone companies now control an incredible *93%* of DSL lines in service. It is inconceivable that the Commission could give any credence to Bell company arguments that they are handicapped by existing unbundling regulations. The facts – not only the Commission's conclusions regarding the reasonable and timely nature of broadband deployment, but the ILECs' own statistics regarding the explosion of their retail DSL offerings – belie any

[53] Illinois Commerce Commission Docket No. 00-0393 (Rehearing), Hearing Transcript (Ireland) at 307: 14-308:11. SBC has announced that it is continuing its deployment of Porject Pronto in Illinois despite the Illinois Commission's requirement that it provide and end-to-end UNE over those facilities.

contention that the Commission's rules inhibit their investment. The incumbents will only be satisfied once they control 100% of the DSL market.

As their comments make clear, the incumbents view the Notice as their first step in accomplishing that goal. That is exactly why the Commission should reject it and its tentative conclusions. The Commission should reject the incumbents' scare tactics and uphold its long line of precedent establishing that: (1) DSL-based transport services are "telecommunications services," and (2) DSL carriers like Covad can purchase UNEs to provide such DSL-based telecommunications services.

C. The Commission Should Reject Verizon's Proposed Definition of a Broadband Service

Verizon goes so far as to argue that the Commission utilize the following definition of "broadband service": "either a service that uses packet-switching or successor technology, or a service that includes the capability of transmitting information that is generally not less than 200 kpbs in both direction."[54] This proposal uncovers the end-game of the incumbents efforts here and in the legislative arena: the elimination of voice from Title II regulation.

As this Commission knows, voice telecommunications services can "use packet-switching." The incumbents have all deployed fiber-fed packet switching networks that can support a vast array of services, including DSL, video, and voice. What Verizion is slyly seeking is for the Commission to declare its so-called "broadband' network off limits in terms of unbundling so that it can eventually place voice over that network absent any unbundling obligations. The incumbents will leave their old network facilities in place, at least for a time, for competitors to use, while it uses its upgraded "broadband"

[54] Verizon Comments, at 6.

network to provide voice, data, and video, unencumbered by regulation. The Commission should clearly reject Verizon's proposal as anticompetitive and contrary to the intentions of the 1996 Act: to provide carriers nondiscriminatory access to the incumbents' networks. Verizon's argument demonstrates the slippery slope that the Notice would engender.

IV. The Incumbent LECs Attempts to Limit State Authority Is Itself Preempted By The 1996 Act

Responding to the Notice, the incumbents, with the notable exclusion of Qwest, argue that the Commission should follow its decision in the *Cable Broadband Declaratory Ruling* and preempt any state efforts to regulate DSL services.[55] Again, this argument stands at odds with the plain terms of the 1996 Act. Section 261(b) provides state commissions with the authority to enforce then existing and prescribe new regulations "in fulfilling the requirements" of the Act, so long as those regulations are not inconsistent with the Act. Moreover, Section 261(c) of the Act specifically authorizes state commissions to impose "additional requirements . . . that are necessary to further competition" beyond those contemplated by the Act, so long as such requirements "are not inconsistent with" the Act or the Commission's regulations. The Commission has generally welcomed state commission cooperation in enforcing the 1996 Act. And it certainly cannot rewrite these statutory grants of authority through a proposed rulemaking.

Indeed, state commissions have used this authority to fill in the gaps of FCC regulations, or address new issues as they arise in practice. In the context of DSL regulation, state commissions have used this grant of authority to order incumbents to

[55] *See* Bell South Comments, at 24; SBC Comments, at 32-37; Verizon Comments, pp. 36-39.

provide line sharing,[56] and the unbundling of fiber-fed loops.[57] As the incumbents continually raise new excuses for their failure to comply with the 1996 Act, it is essential that states have the authority and flexibility to adopt regulations to "further competition." Section 261 provides just that; and nothing in the Notice can change it.

V. Conclusion

For the reasons set forth herein, and in Covad's initial comments, Covad urges the Commission to reverse its tentative conclusions to comport with reality and the statutory framework created by the 1996 Act.

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[57] For example, both Illinois and Wisconsin have ordered Ameritech to provide an end-to-end UNE for DSL carriers to purchase the full functionalities of its Project Pronto architecture. Both states believed their decision to be based on both applicable FCC regulations and applicable state law. *See Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Public Service Commission of Wisconsin Case No. 6720-TI-161, Final Decision, pp. 10-12, 89 (March 19, 2002) (orders unbundling of an end-to-end broadband UNE under federal and state law). *Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Illinois Commerce Commission Case No. 00-0393,Order On Rehearing (September 26, 2001), p. 37 (Commission conducts impair analysis and orders unbundling of an end-to-end broadband UNE and order Ameritech "to file, in Illinois, an interim tariff detailing an end-to-end HFPL UNE based upon the contract terms offered by the arbitrators in Texas.").

Respectfully submitted,

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